1993 **S.H. 93-1019**

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Walker v. Walker Estate, 1998 NSSC 55

BETWEEN:

JOHN HERBERT WALKER, NORA LORRAINE HARRIETHA and JENNIE ANNE BIGNELL

PLAINTIFFS

- and -

SCOTT HADLEY, Executor, by succession, of the Last Will and Testament of John Albert Goodwill Walker, Deceased and Executor of the Last Will and Testament of Maizie Belle Walker, Deceased

DEFENDANT

DECISION

HEARD: **at Halifax, Nova Scotia before The Honourable JusticeWalter R.E. Goodfellow on January 21 and 22, 1998. Final material received on April 1, 1998.**

DECISION: **May 14, 1998**

COUNSEL: **Alan C. MacLean**
Solicitor for the Plaintiff John Herbert Walker

Robert W. Wright, Q.C.
Diana M. Musgrave
Solicitors for the Defendant

GOODFELLOW, J.

1. BACKGROUND

John Albert Goodwill Walker was born May 19, 1918, and met Ethel Dorothy Saville in the fall of 1943. Ethel Dorothy Saville was born September 25, 1921, and when they met, J. Albert Walker was working for the C.N.R. as a porter and Ethel Dorothy Saville was an apprentice hairdresser. J. Albert Walker joined the Royal Canadian Navy and became a leading steward and they married September 20, 1944.

On October 9, 1944, J. Albert Walker was required to report to his ship, H.M.C.S. St. Bonafice. Mrs. Ethel Walker stayed with her husband's parents for some months and then went to her parents in Saint John, New Brunswick, and worked as a shoe store clerk until the seventh month of her pregnancy, May of 1945. Their son, John Herbert Walker, was born at Saint John, New Brunswick, on July 8, 1945, and J. Albert Walker saw his son for the first time on an overnight pass in August of 1945.

Mrs. Ethel Walker went with their son to P.E.I. in October 1945 and stayed with J. Albert Walker's parents until J. Albert Walker's release from the navy that fall, and they decided to go to Halifax, purchase a building, and open a restaurant. They borrowed $2,000.00 from Ethel's father and on April 24, 1946, they purchased the restaurant property at the corner of Salter and Granville Streets from Hum Sing Wing for $2,500.00,

registering their deed on April 25, 1946. On the same date, they took out a mortgage with the Nova Scotia Savings Loan and Building Society in the amount of $1,340.00 by way of an advance on shares held by J. Albert Walker in the Society.

J. Albert Walker hired a cook and waitresses, including one Maizie Belle MacKinnon, and a relationship developed between J. Albert Walker and Maizie. When the relationship came to light, the marriage came to an end and in May 1946, Ethel Walker took their son, John, to Saint John, New Brunswick.

J. Albert Walker provided no maintenance or support for his wife and son, and indicated at the time he could not afford it. Mrs. Ethel Walker needed $25.00 for glasses and he declined providing assistance for this purpose. Mrs. Ethel Walker lived with her parents and took employment. Her 1946 income tax return discloses income for that year of $786.00. On December 11, 1947, Mrs. Ethel Walker's father passed away.

J. Albert Walker, in 1948, took Mrs. Ethel Walker to see a lawyer and, at that time, he stopped at her residence and saw his son, John Herbert Walker, briefly at the door to the house and gave the boy a quarter. The result of their visit to the lawyer was an agreement which was not executed until October 19, 1949. While Mrs. Ethel Walker had her own lawyer at the time the agreement was executed, she did not know of the financial position of her husband at that time; for example, that Maizie MacKinnon obtained a property on Maitland Street in Halifax from Provincial Realty, the mortgage to which was signed by her and J. Albert Walker. The agreement was made in anticipation of divorce

and a payment of $1,800.00 to Mrs. Ethel Walker in complete satisfaction of any and all of her claims for alimony for herself or maintenance, support, and education for their son, John Herbert Walker.

John Albert Goodwill Walker died on August 27, 1992, having made a last will and testament dated December 8, 1987. This will was probated on September 18, 1992, and named Maizie Belle Walker, his second wife, as sole executrix and sole heir.

John Herbert Walker issued an originating notice and statement of claim March 17, 1993, claiming relief pursuant to the **Testators' Family Maintenance Act**.

Maizie Belle Walker died on February 23, 1994, having made a last will and testament dated November 23, 1992. Her will was probated on April 5, 1994, and named Scott Hadley, a son-in-law, as sole executor.

The inventory of the estate of J. Albert Walker, filed December 21, 1994, indicated a value of the estate of $1,683,376.00. Apparently this did not include an income tax deferral to the estate of Maizie Belle Walker in the amount of $408,987.00.

The inventory of the estate of Maizie Belle Walker, filed the same date, December 21, 1994, indicated a net value of the estate before taxes of $2,684,023.00, without taking into account the income tax liability to Revenue Canada which was then estimated at approximately $750,000.00.

The actions of Nora Lorraine Harrietha and Jennie Anne Bignell, daughters of the late John Albert Goodwill Walker and Maizie Belle Walker, against the estate of Maizie Belle Walker, were settled shortly before trial leaving outstanding the claim of John Herbert Walker against the estate of John Albert Goodwill Walker.

Counsel agreed on the tendering of selected pages of the evidence of Sharon Taylor, C.G.A., niece of Maizie and J. Albert Walker. Ms. Taylor gives evidence indicating some of the benefits conferred on children other than John Herbert Walker and comments made by Maizie Walker as relates to the claim of John Herbert Walker and her instructions with respect to her will.

Selected pages of the discovery evidence of Scott Hadley, nephew of Maizie and J. Albert Walker and the executor of the wills, was admitted into evidence and, generally, his evidence indicates his knowledge of Maizie Walker's instructions with respect to her will and the benefits conferred by Maizie Walker and the late J. Albert Walker upon children other than John Herbert Walker.

In addition, admissions were made as to the circumstances surrounding the preparation and execution of the will of the late John Albert Goodwill Walker by William A. Sutherland, Q.C.

This additional evidence is more specifically referred to later in this decision.

2. LEGISLATION

1. **Testators' Family Maintenance Act**, c. 465.

Interpretation

2. In this Act,

(a) "child" includes a child

(iii) of which the testator is the natural parent;

(b) "dependant" means the widow or widower or the child of a testator;

Order for adequate maintenance and support

3. (1) Where a testator dies without having made adequate provision in his will for the proper maintenance and support of a dependant, a judge, on application by or on behalf of the dependant, has power, in his discretion and taking into consideration all relevant circumstances of the case, to order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependant.

Inquiry by judge

5. (1) Upon the hearing of an application made by or on behalf of a dependant under subsection (1) of Section 3, the judge shall inquire into and consider all

matters that should be fairly taken into account in deciding upon the application including, without limiting the generality of the foregoing,

(a) whether the character or conduct of the dependant is such as should disentitle the dependant to the benefit of an order under this Act;

(b) whether the dependant is likely to become possessed of or entitled to any other provision for his maintenance and support;

(c) the relations of the dependant and the testator at the time of his death;

(d) the financial circumstances of the dependant;

(e) the claims which any other dependant has upon the estate;

(f) any provision which the testator while living has made for the dependant and for any other dependant;

(g) any services rendered by the dependant to the testator;

(h) any sum of money or any property provided by the dependant for the testator for the purpose of providing a home or assisting in any business or occupation or for maintenance or medical or hospital expenses.

Evidence at hearing

(2) Upon the hearing of an application under subsection (1) of Section 3, the judge, in addition to any evidence adduced by the parties appearing, may direct evidence to be given in respect of any matter that the judge considers relevant.

Evidence of testator's reasons

(3) Upon the hearing of an application under subsection (1) of Section 3, the judge may receive any evidence the judge considers relevant of the testator's reasons, as far as ascertainable, for making the dispositions made by his will, or for not making provision or further provision, as the case may be, for a dependant, including any statement in writing signed by the testator. R.S., c.303, s.4.

2. Interpretation Act, R.S., c.235

Law always speaking

9. (1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.

Interpretation of enactment

(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

(a) the occasion and necessity for the enactment;

(b) the circumstances existing at the time it was passed;

(c) the mischief to be remedied;

(d) the object to be attained;

(e) the former law, including other enactments upon the same or similar subjects;

(f) the consequences of a particular interpretation; and,

(g) the history of legislation on the subject.

3. VALUATION: ESTATE OF J. ALBERT WALKER

ESTATE OF MAIZIE BELLE WALKER

J. Albert Walker died on August 27, 1992, and the parties agree that the value of the estate, after allowance for any tax consequences, is $1,532,876.00.

Maizie Belle Walker died February 23, 1994, and the value of her estate, as of the time of her death, is agreed to be, after allowance for any tax consequences, $1,808,223.00.

4. ISSUES

1. Has John Herbert Walker established an entitlement to relief under the provisions of the **Testators' Family Maintenance Act**?

2. If the answer to Issue #1 is "yes", what is the appropriate relief?

5. PRINCIPLES TO BE APPLIED

Application

(1) Who may apply?

A "dependant" as defined in s.2(b).

(2) Is a dependant child limited to one who is an infant?

No. **Allardice v. Allardice** [1911] A.C. 730 followed by the Nova Scotia Court of Appeal in **Garrett v. Zwicker** (1976) 15 N.S.R. (2d) 118 (N.S.C.A.), a child, to be an dependant entitled to claim, need not be an infant, disabled or otherwise dependent in law as, for example, defined by the **Divorce Act**, R.S. 1985, c.

(3) Onus

A dependant may apply for maintenance and support if he or she establishes, that is, meets the burden on a balance of probabilities that the testator has not "made adequate provision in his Will for the proper maintenance and support ."

MacKeigan, C.J., stated in **Garrett v. Zwicker** (above) at page 134:

> To justify interference with a will a court must thus find a failure to provide "proper maintenance and support", i.e. both a need for maintenance, relative to the size of the estate of the estate, and a moral claim, which may be of varying strength.

(4) Purpose - Interpretation Act

The mischief sought to be remedied by the legislation is stated in **Re Allen, Allen v. Manchester** [1922] N.Z.L.R. 218, at page 220, adopted by our Court of Appeal in **Garrett v. Zwicker** at page 127, Salmond, J., stated at page 220:

> The Act is designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.

Tataryn v. Tataryn Estate [1994] 2 S.C.R. 807; 169 N.R. 60. In reading this case, one must acknowledge that the wording in the British Columbia **Wills Variation Act**, s.2(1), while very similar to s.3(1) of the Nova Scotia **Testators' Family Maintenance Act**, does provide greater direction to the court in that the latter part of the British Columbia provision provides that the court may, in its discretion,

> ... order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the estate of the testator for the wife, husband or children.

This follows the earlier wording which is almost identical to the Nova Scotia legislation, but uses the terminology "adequate provision for the proper maintenance and support", and the Nova Scotia statute uses "for the proper maintenance and support of the dependant" and the final portion of the Nova Scotia section empowers the court in its discretion:

> ... to order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper

maintenance and support of the dependant.

It is my interpretation that the British Columbia statute provides somewhat broader discretion; however, the interpretation of s.3(1) of the Nova Scotia **Act** must be made in the context of the entire **Act** and, in particular, the mandatory inquiry called for by s.5(1) and the direction and assistance provided by the Nova Scotia **Interpretation Act**.

In interpreting the Nova Scotia statute, we have the direction provided by McLachlin, J., in **Tataryn v. Tataryn Estate** (above) where she commented on the rule that a statute is always speaking as directed by the **Interpretation Act** specifically said:

> The generosity of the language suggests that the legislature was attempting to craft a formula which would permit the courts to make orders which are just in the specific circumstances and in light of contemporary standards. This, combined with the rule that a statute is always speaking (**Interpretation Act**, R.S.B.C. 1979, c.206, s.7), means that the Act must be read in light of modern values and expectations. What was thought to be adequate, just and equitable in the 1920s may be quite different from what is considered adequate, just and equitable in the 1990s. This narrows the inquiry. Courts are not necessarily bound by the views and awards made in earlier times. The search is for contemporary justice.

(5) History of the legislation

McLaughlin, J., for a unanimous court in **Tataryn v. Tataryn Estate** (above) referred to the history of the B.C. legislation and stated at page 237:

> The statute, adopted in 1920, was modelled on New Zealand legislation.

MacKeigan, C.J., in **Garrett v. Zwicker** (above) noted at page 124:

> Our Act, like the similar Acts in most provinces adopts the principles and most of the language of the New Zealand **Family Protection Act** of 1908, as do statutes in the Australian states.

And then MacKeigan, C.J.,mentions, with approval, **Allardice v. Allardice** (above).

(6) Maintenance and support

Roscoe, J., (as she then was) in **Kuhn v. Kuhn Estate** (1992) 112 N.S.R. (2d) 39 canvassed the interpretation of s.3(1) and noted at page 45:

> **[25]** The words of s.3(1) "adequate provision ... for the proper maintenance and support of a dependant" have received judicial interpretation in a number of Nova Scotia cases. In **Garrett v. Zwicker** (1976) 15 N.S.R. (2d) 118; 14 A.P.R. 118 (C.A.), Chief Justice MacKeigan adopted the reasoning of the Supreme Court of Canada in **Walker v. McDermott** [1931] S.C.R. 94, a case which arose from British Columbia, and quoted Duff, J.'s, reasons as follows:
>
> > "What constitutes 'proper maintenance and support' is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the court on whom devolves the responsibility of giving effect to the statute, would

> naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view), consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had. If the court comes to the decision that adequate provision has not been made, then the court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account."

MacKeigan, C.J.N.S., continued at p. 133:

> "The dependant claimant need not, however, show need in the sense of actual want in order to qualify for consideration under the **Act**, and need not show actual dependancy upon the testator. The need is relative, relative to the extent of the estate and the strength of other claims."

And further, on p. 134:

> "To justify interference with a will a court must thus find a failure to provide 'proper maintenance and support', i.e., both a need for maintenance, relative to the size of the estate, and a moral claim, which may be of varying strength.
>
> "All 'dependants' of a testator do not necessarily have moral claims of equal strength. A testator is entitled, for example, to discriminate among his children, giving one more than another , for good reason or no apparent reason, so long as he comments no 'manifest wrong' in failing to give one the minimum that is 'proper maintenance and support' in the circumstances."

And further, at p. 136:

> "The task before this court is to determine whether the testator failed to make 'adequate provision in his will for the proper maintenance and support' of his adult daughter, the respondent Mrs. Garrett, so as to warrant interference by the court. The question to be asked is moral, not economic. In ignoring the respondent in his will, was the testator in all the circumstances guilty of a 'breach of morality', or a 'manifest breach of moral duty'?"

The legislature here speaks conjunctively and does not limit relief to need. This terminology was extensively reviewed by MacKeigan, J.A., in **Garrett v. Zwicker** (above), all of which I have considered and only refer to a few passages in the interests of brevity.

At paragraph 13, after reviewing a number of cases, concluded:

> All these cases explain what is involved in the basic concept of "adequate provision . . . . . for the proper maintenance and support" of a dependant.

At page 129, paragraph 22 from **Bosch** (1938) A.C. 476. Lord Romer obviously had in mind his own statement (A.C. page 476, All E.R. page 20) that:

> A small sum may be sufficient for the "adequate" maintenance of a child, for instance, but, having regard to the child's station in life and the fortune of his father, it may be wholly insufficient for his "proper" maintenance.

At page 129, paragraph 23 from **Walker v. McDermott** [1931] S.C.R. 94, Duff, J., (as he then was) for the majority briefly adverted to the principles:

> What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence.

At page 133:

> The dependent claimant need not, however, show need in the sense of actual want in order to qualify for consideration under the Act, and need not show actual dependency upon the testator. The need is relative, relative to the extent of the estate and the strength of other claims.

After which MacKeigan, C.J., adopts what Gressan, P. said in **Re Harrison** (1962), N.Z.L.R. at p. 13:

> It is rather unfortunate that there has crept into the cases over the years a disposition sometimes to consider first the "need' of the applicant and then to turn to a consideration of the extent of the estate and other claims there might be upon the testator. These considerations do not admit of separate consideration; they are interrelated.

(7) The magnitude of the estate

As already noted, MacKeigan, C.J., commented that the need is relative, relative to the extent of the estate and he went on to say at page 136, after outlining the task before the court:

> The question must be answered by weighing and balancing the nature and extent of the claimant's need, *the size of the estate*, the strength of the claimant's moral claim, and the significance of the testator's attempt to fulfil his primary obligation to his wife.

MacKeigan, C.J., also stated at page 128:

> A large estate thus permits a wider definition of the needs which the testator has a moral obligation to meet if he can, and at the same time supplies the means to satisfy that duty without preventing him from adequately providing by his will for other dependents who have equal or greater claims upon his bounty.

Bastarache, J.A., (as he then was) in **Currie et al v. Currie Estate** (above) stated at page 156:

> There is obviously no clear legal standard by which to judge the moral duties, as McLaughlin, J., observed. A thorough review of the cases shows only that each case turns on its particular facts. McLaughlin, J., suggests that in general, "if the size of the Estate permits and in the absence of circumstances which negate the existence of such an obligation, some provision for such children (i.e. independent

> adults) should be made. (**Tataryn et al v. Tataryn Estate** [1994] 2 S.C.R. 807; 169 N.R. 60, and at page 823 S.C.R.).

(8) Freedom of testamentary disposition

Currie et al v. Currie Estate (1995) 166 N.B.R. (2d) 144 (CA). The New Brunswick Court of Appeal was addressing the interpretation of the New Brunswick **Provision for Dependants Act** of which s.2(1) is essentially the same wording as s.3(1) of the Nova Scotia **Testators' Family Maintenance Act**. In overturning a direction by the trial judge awarding one third of an estate valued at $78,903.85, Bastarache, J.A., (as he then was) stated at page 159:

> **[27]** The common law right to dispose of one's assets by will is deeply rooted and must only be avoided where there is a clear case made by the claimant. Although a liberal interpretation must be favoured, some attention must be given to the fact that the freedom of testamentary disposition has not been abolished and that the word "dependant" has been retained in the **Provision for Dependants Act**.

McLachlin, J., in **Tataryn** (above) at page 239:

> The Act did not remove the right of the legal owner of property to dispose of it upon death. Rather, it *limited* that right.

In applying s.3(1), McLachlin, J., at page 240 said:

> This Court rejected the need-maintenance approach to the Act in **Walker v. McDermott** [1931] S.C.R. 94. At issue was the right of an independent child to share in an estate which the testator had left entirely to his wife. This Court upheld the trial judge's decision to award the child $6,000 of the $25,000 estate, overruling the Court of Appeal's decision that all should go to the wife. Duff, J. (as he then was), speaking for the majority, enunciated the following test (at p. 96):
>
> > What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the court on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view), consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had.
>
> **Walker v. McDermott** may be seen as recognizing that the Act's ambit extended beyond need and maintenance.

In referring to the cases that followed **Walker v. McDermott**, McLachlin, J., noted at page 241:

> This line of authority culminated in **Price v. Lypchuk Estate** (1987) 11 B.C.L.R. (2d) 371 (C.A.). Lambert, J.A., speaking for the majority, stated (at p. 380):
>
> > There is a further question about whether all the issues raised by s.2(1) of the Act can be determined by economic considerations alone, or whether moral considerations must also be

> weighed. *The answer to that question is now settled. Moral considerations are relevant.*
>
> ...
>
> In my opinion, the very structure of the Act makes it clear that the legislative scheme contemplates that the concept of moral duty is an essential element in the working of the Act.

Continuing at page 242:

> It has been further suggested that this court ought to replace the "judicious father and husband" test it set out in **Walker v. McDermott** and return to the needs-based analysis which prevailed in the early years of the Act. With great respect to the arguments to the contrary, I am not persuaded that we should do so.

(9) Legal claims - priority

Legal claims, that is, the legal claim for support and maintenance of a widow or infant children must be considered in priority to moral claims.

McKeigan, J.A., in **Garret v. Zwicker** (above), page 134:

> The legal and moral duty to support a wife, infant children or disabled adult children is obviously much stronger than the moral duty to give marginal support to a normal adult child, male or female.

While legal claims take precedent over moral claims, where the size of the estate

permits all claims should be met.

In **Tataryn** (above), Mrs. Tataryn had worked hard and contributed much to the assets acquired during the marriage. Mr. Tataryn had a legal obligation to her for maintenance and her contribution supported entitlement under the equivalent to the **Matrimonial Property Act** and, indeed, she would have had a claim based upon resulting or constructive trust. She also had a moral claim of high order in that the asset accumulation was for their retirement and it would be unjust to deprive Mrs. Tataryn of such solely because her husband predeceased her. The moral claims of the two sons could not be put very high as there was no evidence that either contributed much to the accumulation of the estate.

The decision of McLachlin, J., was the decision of the court (seven justices).

(10) Discretion

S.3(1) of the **Act** clearly confers discretionary authority in the judge taking into consideration all relevant circumstances to order whatever provision the judge deems adequate to be made out of the estate for the proper maintenance and support of the dependant. This discretionary power is such that when an appeal is taken from an order under the **Act**, the Court of Appeal has concluded that it is in as good a position normally as the trial judge in deciding what is a proper exercise of discretion.

Guidance as to the meaning of the judicial exercise of a discretionary power was recently given by our Court of Appeal in **Clark v. O'Brien** [1995] N.S.J. 458, C.A. 115107, approving of:

> In **Sharp v. Wakefield et al.** [1891] A.C. 173, Lord Halsbury expressed what is meant by the judicial exercise of discretionary power in the following terms (page 191):
>
> > An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion: Rooke's Case(1); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

Bateman, J.A., went on to say in paragraph 37:

> In other words, the discretion must be exercised within a rational framework.

The discretion I must exercise is directed by the guidance provided by our Court of Appeal and the directions contained within the **Act** itself. I am considerably assisted by the opportunity to observe John Herbert Walker in the course of his giving evidence. He projects himself as a person of credibility and, although there is an obvious monetary

aspect to his claim, he left me with the clearest of impression that the moral aspect is of considerable significance to him.

(11) Testators' Family Maintenance Act

(i) Consideration s.5(3)

It is agreed that William A. Sutherland, Q.C., took instructions and prepared the will of John Albert Goodwill Walker and he was not made aware of the existence of John Herbert Walker. Mr. Sutherland acknowledges that John Albert Goodwill Walker made no reference to John Herbert Walker at any time in his discussions surrounding the preparation of his will or in the specific instructions for the will.

Sharon Taylor, at the request of Maizie Walker, came from her home in Toronto, on three or four occasions, and her Aunt Maizie showed her the papers whereby John Herbert Walker was contesting Uncle Albert's will and Maizie told Ms. Taylor at that time that as far as she was concerned, he had no right to contest the will because his mother signed the settlement and Maizie indicated she was going to fight the claims of John Herbert Walker. Maizie also told Sharon Taylor that she was going to exclude Jennie and Donald from her will as they had already received substantial assistance. Ms. Taylor met Mr. Sutherland and there was no discussion with respect to Nora Lorraine Harrietha, who was the illegitimate daughter of Maizie Walker, other than Aunt Maizie said she paid for her daughter's support when she was a child and took presents and clothing. She has no

recollection of Mr. Sutherland mentioning the **Testators' Family Maintenance Act** or any of these potential problems. Ms. Taylor did ask if she was including Lorraine, and Maizie Walker told her that Lorraine had her share and that was it.

I conclude that there is no evidence, in writing or otherwise, indicating why J. Albert Walker made no provision for his son, John Herbert Walker. I infer that he probably followed the philosophy of out-of-sight out-of-mind and further considered that he had finalized his financial obligation by virtue of the agreement of October 19, 1949.

(ii) Consideration of s.5(1)

> **(a)** whether the character or conduct of the dependant is such as should disentitle the dependant to the benefit of an order under this Act;

There is absolutely nothing in the character or conduct of John Herbert Walker that would, in any way, disentitle him to the benefit of an order under the **Act**. Quite the contrary, he was a baby when, for a period of three and a half years, no support was provided to him or his mother and, after the agreement, when he was older, he conducted himself as a very responsible child, young man and, eventually, as an adult. The circumstances as a child and young adult were such that, absent his father, he took upon himself responsibility as the head of the household to the extent of his ability and, to a

considerable degree, missed out on the childhood he would probably have had with a parent present.

> **(b)** whether the dependant is likely to become possessed of or entitled to any other provision for his maintenance and support;

There is no evidence that John Herbert Walker is likely to be the beneficiary of any trust, inheritance, or other source, to which he would have any entitlement for his maintenance and support other than should his wife, Linda Walker, predecease him, then presumably both he and their children might have some entitlement as against her estate which, at the present time, is not what one would label substantial.

John Herbert Walker's mother, the first wife of John Albert Walker, worked much of her life in a shoe store. She is now 76 and has limited resources so that John Herbert Walker is not likely to receive any assistance of substance, from her estate, should his mother predecease him.

> **(c)** the relations of the dependant and the testator at the time of his death;

There are no relations or relationship between the father and son at the time of his

death. John Herbert Walker only saw his father on two occasions since his father's relationship with Maizie Belle Walker which commenced in 1946, before John Herbert Walker reached his first birthday. The first occasion was in 1949 when he gave John Herbert Walker a quarter and followed up with the agreement of October 19, 1949. The second occasion was at the initiative of John Herbert Walker. The son often thought about the father and, when he graduated from Saint John Vocational (with relatively good marks), he drove down to the funeral home and, when he went in, the lady addressed him as, "You be John? Your father will be out in a moment," or words to that effect. The father and his son went to kitchen area and talked for 20 to 25 minutes. Maizie Walker was there at all times and, after showing the son around, the father wished him a good trip home and they parted. It was an emotional time for the son and he thought that his father would establish contact, but there was no further communication and John Herbert Walker learned of his father's death from a third party who indicated that John Herbert Walker was not mentioned in the obituary.

(d) the financial circumstances of the dependant;

The evidence very clearly indicates somewhat of a difficult childhood for John Herbert Walker. The accommodation available to his mother and himself would, at best, be described as modest. The initial flat was without hot water and, not unlike a lot of families at that time, they had an ice box and John Herbert Walker, when he went to work in 1963, bought their first refrigerator. Coal was often obtained from spillage at the railway tracks and hauled home by John Herbert Walker by cart from an early age of around

seven. The family had extremely limited means, but were rich in values and family warmth. John Herbert Walker was, to some extent, deprived of a childhood by becoming the man of the house while a teenager. He progressed in education and, although he graduated from Vocational School, he did have earlier aspirations for higher education, but the choice had to be made due to lack of financial resources. John Herbert Walker is possessed of the work ethic, a sense of family responsibility, and a good measure of public responsibility to the community. He trained as an insurance underwriter and worked in the evenings on the railways. Unfortunately, some of his early business adventures were less than successful and he entered bankruptcy, obtaining his discharge June 21, 1984. He and his wife, Linda, who have two children survived the bankruptcy and there is, in evidence, a trustee's deed to Linda Walker whereby she retained the home, 121 Simpson Drive. It appears that little else in the way of assets or resources were available to him or his wife, and he essentially started out fresh. A summary of his income tax returns reveals the following:

YEAR	TOTAL INCOME	YEAR	TOTAL INCOME
1974	$14,669.62	1986	$12,631.05
1975	$11,419.09	1987	$13,100.00
1976	$66,471.92	1988	$23,800.00
1977	$11,553.00	1989	$16,900.00
1978	$10,251.70	1990	$17,021.66
1979	$13,051.82	1991	$18,282.50
1980	$ 5,068.45	1992	$18,200.00
1981	$ 9,994.88	1993	$20,821.44
1982	$13,345.36	1994	$35,857.94
1983	$ 1,120.00	1995	$40,810.69
1984	$ 4,700.00	1996	$24,007.74
1985	$12,500.00		

Evidence was led to show some variations to the foregoing, but, essentially, he has been and continues to be a person of relatively limited income. He has given much of himself to the community and had a relationship existed between father and son, I have no doubt the father would have been proud of the lifestyle and public commitment of his son. His present income is likely to be in the $23,000 to $24,000 range per annum and an additional source of income of uncertain duration as a member of the New Brunswick Liquor Board, which is likely to bring him in between $4,500 and $5,000 gross. There is shown on his detailed statement of net worth, there are some modest to low value properties that produce some limited rental income. The net worth statement for Mr. Walker as of, presumably, the trial, shows a net (pre-tax) of $118,903.02. This is reasonably accurate, but subject to a number of pluses and minuses. For example, I am not certain it takes into account possible tax consequences on the disposable properties and the RRSPs, which make up a substantial portion of his assets ($62,932.81), are noted to be pre-tax. They alone would likely carry a tax deferral of approximately one third.

Mrs. Linda Walker, who retained the matrimonial home from the bankruptcy, has a full-time job. Neither John Herbert Walker or his wife, Linda, appear to have any pension entitlement and the matrimonial home appears to be pledged to the Hong Kong Bank. RRSPs form a major part of their net worth and have been listed in evidence pre-tax separate and apart from other probable tax implications relating to real property holdings. The RRSPs alone should be discounted by the inevitable tax consequence. The business which provides John Herbert Walker with his income is also the vehicle that provides income to their two children.

> **(f)** any provision which the testator while living has made for the dependant and for any other dependant;

The only arrangement made for Mr. Walker's first wife, Ethel Dorothy Walker, and first son, John Herbert Walker, was the agreement of October 19, 1949. I do note that the *decree nisi*, issued October 3, 1949, and the *decree absolute*, issued February 16, 1950, contained a similar provision dealing with the custody of John Herbert Walker, namely:

> IT IS ORDERED, ADJUDGED AND DECREED that the said Petitioner shall have the sole control and custody of John Herbert Walker, the infant child of the said marriage.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the order as to the custody of the said child shall be open to review at any time in the discretion of a Judge of the said Court.

Both the *decree nisi* and *decree absolute* are silent with respect to support and maintenance for either Ethel Dorothy Walker or John Herbert Walker and make no reference to the agreement of October 19, 1949.

John Albert Walker married Maizie on October 12, 1951. Maizie had a daughter, Nora Lorraine Harrietha, born February 20, 1944, whose father was a Mr. Cox. The brief filed by the defendants recites that the child was left by Maizie with a relative in Sydney Mines when she was three years old and the child did not learn that Maizie was her mother until she was approximately ten. Lorraine did not inform Maizie that she was aware of this

fact until she was in her thirties, at which time they engaged in a relationship of mother and daughter. Both Maizie and J. Albert Walker attended anniversaries and weddings for Lorraine and her children and J. Albert Walker, through Maizie, gave Lorraine $5000 to be applied to pay off the mortgage on their home and Lorraine's husband was given an additional $5000 for this purpose. It would appear that whenever Lorraine and her husband ran into any financial difficulties, they could turn to her mother.

Maizie and J. Albert Walker had six children, Ronald, Donald, Jennie, Christine, Lucy and Dana Mae. There is extensive detailed evidence tendered by agreement indicating the degree of support benefit and financial assistance provided by J. Albert Walker and Maizie to their children, separate and apart from the financial and moral obligations they fulfilled in raising the children. When J. Albert Walker died, he left a brief will leaving everything to Maizie; however, he had previously made some notes and a will that is also evidence of the additional assistance provided by him to their children. The discovery evidence of Mr. Hadley tendered by consent gives some insight into the extent to which various children received benefits from J. Albert Walker and their mother through businesses. Specifically, the parties agreed that the following information constituted part of the evidence:

> #23 - provide information re any financial support given to the children;
> Response: In late response, information was finally provided on January 7, 1998 as follows:
>
> (1) "Various monies were expended by the Proprietorship and by J. Albert Walker Funeral Home Limited on behalf of Donald Walker, Ronald walker and Dana Mae Walker at

various times. The respective total amounts are as follows:

(a) Donald Walker - $88,288.00;
(b) Ronald Walker - $48,000.00
(c) Dana Mae Walker - $5,122.00

(2) Additionally, at various times over the years Donald Walker, Dana Mae Walker and Jennie Anne Bignell and Christine Walker received rent free accommodation at various properties owned by the Proprietorship or by companies Mr. and Mrs. Walker owned."

#24 - provide information on any loans, co-signed loans or loans paid out on behalf of any of the named children through the years;

Response: "Mr. Walker signed a Promissory Note on paper of the Royal Bank of Canada for $75,000 on behalf of Ronald Walker. As of December 31, 1994, Mr. Walker owes the estate $70,386.11. Mortgage payments were made on Donald Walker's personal residence and the accounts receivable on the books of the Estate in this regard is $12,370."

#25 - provide records of employment for the children as it related to any of Mr. Walker's businesses;

Response: "Christine Walker was employed on an occasional basis during the ten years prior to 1994. Jennie Anne Bignell and Dana Mae Walker were employed on an occasional basis during the fifteen years prior to 1994. Donald Walker was employed from 1966 to the present. Ronald Walker was employed from 1967 to 1971\2. Lucy Hadley has been employed since 1994."

#26 - provide a listing of residential accommodations provided for children;

Response: "Christine Walker has rented premises at 145 Herring Cove Road since 1988 for $400 per month. The rent owing is being charged against her interest in the Estate. Dana Mae Walker has rented premises at 149 Herring Cove Road since 1993 for $400 a month. The amount owing in this regard is also being charged against her interest in the Estate."

#27 - provide a list of the years vehicles were provided and to whom;

Response: "No such vehicles were provided."

#28 - provide a list of vacations given to or taken with the children over the years;

Response: "I do not know the answer to this question."

#29 - provide a statement of any assistance given in post-secondary education for any of the children;

Response: “No assistance was given to any of the children in this regard.”

The totality of the evidence, coupled with the fact only two of the children of Maizie Walker advanced any claim against her estate and the settlement specifics set out in the order of the court whereby Nora Lorraine Harrietha received $75,000 by installments with interest, which will be totally paid by October 31, 1999, and the claim of Jennie Anne Bignell was settled as a matter of court record for $85,000 with interest, payable by installments ending September 30, 1999, reflect considerable financial benefit as been bestowed by J. Albert Walker and Maizie Walker upon the six children of their marriage, including benefits long after they became adults. I reach the conclusion that J. Albert Walker fully met his legal and moral obligation to his wife, Maizie, and by virtue of the moral and financial assistance provided while the children of he and Maizie were growing up and the additional assistance and benefits these children derived after adulthood coupled with the settlements for two of the children from the estate of Maizie Walker which, essentially, is the estate of J. Albert Walker.

The only child towards whom the moral obligation as a parent has not been met is John Herbert Walker. Strictly speaking, the settlements for two of the children are not under this specific heading. What these two children had at the time of their father’s death was a right to apply under the **Testators’ Family Maintenance Act** and they chose not to make any application at that time, but did so on the subsequent death of their mother. The

factual information as to their settlements are not necessary for my determinations. The defendant takes the view that the court should not consider anything that has transpired since John Albert Goodwill Walker's death, based on the decision in **Maldaver v. Canada Permanent Trust Company** (1982) 53 N.S.R. (2d) 500. As I have already indicated, I do not need to rely upon the information with respect to the settlement of claims against Maizie Walker's estate. Had it been necessary to do so, I would have reached a contrary conclusion. S.7 makes it clear that where an order has been made for proper maintenance and support, an application can be made subsequently to inquire whether the party benefitted has become possessed of or entitled to an alternate capacity for maintenance or support and, specifically, S.7(1)(b) inquire into the adequacy of the provision ordered. S.7(1)(c) empowers the court to discharge, vary, or suspend the order, or make any other orders the judge considers proper in the circumstances. There is no limitation in this broad power conferred upon the court to limit any application to the circumstances that exist exclusively at the time of death of the testator.

In any event, I do not have to address the matter because I reach the same conclusion based on the factual determination that John Herbert Walker is the only applicant for relief on the death of his father.

I would also comment that, in many respects, the **Act** is forward looking. For example, s.5(1)(b) directs the court to consider whether the dependant is <u>likely</u> to become possessed of any provision for support.

(g) any services rendered by the dependant to the testator;

There were no services rendered by John Herbert Walker to his father. No opportunity was ever extended or offered to this son to participate in any way in the business and other activities of his father.

(h) any sum of money or any property provided by the dependant for the testator for the purpose of providing a home or assisting in any business or occupation or for maintenance or medical or hospital expenses.

None.

7. AGREEMENT - OCTOBER 19, 1949

Ethel Dorothy Walker entered into the agreement on October 19, 1949, and it contained the following provisions:

> 2. THAT the said John Albert Goodwill Walker shall deposit with Messrs. Burchell, Smith, Jost, Meagher & Burchell, Barristers and Solicitors of Halifax aforesaid, the sum of EIGHTEEN HUNDRED DOLLARS ($1,800.00), which sum, upon the said marriage being dissolved, shall be paid to the said Ethel Dorothy Walker to be used by her for the maintenance, support and education of the said John Herbert Walker.

> 3. THAT upon the said divorce being granted and receipt of the said sum of $1,800.00, the said Ethel Dorothy Walker hereby agrees to provide for the maintenance, support and education of the said John Herbert Walker until he attains the age of twenty-one (21) years, and further agrees not to demand any further assistance from the said John Albert Goodwill Walker for the past or future support, maintenance and education of the said John Herbert Walker.
>
> 4. THAT upon the said divorce being granted and receipt of the said sum of $1,800.00, the said Ethel Dorothy Walker hereby agrees that she will not make any claim against the said John Albert Goodwill Walker for any past or future support, maintenance or alimony for herself from the said John Albert Goodwill Walker.

It has long been determined that a separation agreement between parents is no bar to the jurisdiction of a court to award support for a child. **Willick v. Willick** (1994) 6 R.F.L. (4th) 178 per Sopinka, J.:

> As stated by Professor McLeod in his annotation on **S. (A.J.) v. S. (G.F.)** (1987) 7 R.F.L. (3d) 292 (N.S.C.A.), at pp.293-294, the true question is the effect of the agreement in restricting the court's discretionary jurisdiction.
>
> The reasoning which supports the restrictions with respect to interspousal support does not apply to child support. In **Richardson v. Richardson** [1987] 1 S.C.R. 857, at pp.869-870, Wilson, J., explained the different nature of the two rights:
>
> > This inter-relationship [between spousal maintenance and child support] should not, however, lead us to exaggerate its extent or forget the different legal bases of the support rights. The legal basis of child maintenance is the parents' mutual obligation to support their children according to their need. That obligation should be borne by the parents in proportion to

> their respective incomes and ability to pay: **Paras v. Paras, supra....** Child maintenance, like access, is the right of the child: **Re Cartlidge and Cartlidge** [1973] 3 O.R. 801 (Fam. Ct.). For this reason, a spouse cannot barter away his or her child's right to support in a settlement agreement. The court is always free to intervene and determine the appropriate level of support for the child.... Further, because it is the child's right, the fact that child support will indirectly benefit the spouse cannot decrease the quantum awarded to the child.

An agreement between parents that purports to address, with finality, the obligation for maintenance and support under the **Divorce Act** or Provincial legislation such as the **Family Maintenance Act** for a child is to be given careful consideration as it generally follows that the parents concluded, at the time that the terms agreed upon adequately provided for the needs of the child. This is particularly so where an agreement is incorporated in a divorce decree. As already noted, both the *decree nisi* and *decree absolute* are silent with respect to support and maintenance for either Ethel Dorothy Walker or the child, John Herbert Walker, and make no reference to the agreement of October 19, 1949.

The duty of the court, under the **Testators' Family Maintenance Act** is to conduct itself in accordance with the principles I have reviewed which include the statutory requirements of s.3(1) and s.5. The position of an agreement is a factor for consideration in the inquiry by virtue of s.5(1)(f) in particular. There is no statutory bar that arises by the parents' entry into an agreement purporting to relieve a parent of future obligation towards

a child. The obligation of a parent to a child is contained in the **Criminal Code**, Federal and provincial statutes, and at common law. There is no statutory bar.

The agreement itself is not one that makes any reference whatsoever to the **Testators' Family Maintenance Act**. Had it purported to waive any entitlement under the **Testators' Family Maintenance Act**, it would have been invalid by virtue of s.16(2) which provides that no contracting out of the **Act** is binding. In addition, it would not likely be binding upon John Herbert Walker due to that fact he was a four year old infant.

The agreement does not contain a provision purporting to making the agreement binding upon the heirs, executors, administrators and assigns of his estate. If such had been inserted, it would only be evidence that J. Albert Walker might be said to have directed his mind to the distant future.

8. CONCLUSION

I have carefully applied the legal principles reviewed and conclude that John Herbert Walker has clearly met the onus upon him of establishing on a balance of probabilities that his father, John Albert Goodwill Walker, died without having made adequate provision in his will for the proper maintenance and support of his son, taking into account all relevant circumstances. John Herbert Walker has established that his late father has not met his

legal and moral duty by failing to make adequate provision in his will for the proper maintenance and support of his son. I find that John Herbert Walker has a need for maintenance relative to the size of his father's estate and a very strong moral claim. The claim of John Herbert Walker can be met without materially interfering with the priority required to be given to the legal claims of his widow at the time of his death. I have guarded against any consideration that the other children, having received benefits, have anything to do with his possible entitlement. John Albert Goodwill Walker was entitled to discriminate between his children and the court should not interfere with the freedom of disposition accorded a testator except where an applicant has met the onus upon him. Even then, the testator's freedom of disposition is not to be interfered with lightly even where, as is the case here, a particularly strong moral claim has been established against the estate, an estate of considerable magnitude. Any interference with the freedom of disposition of John Albert Goodwill Walker should do as little encroachment on his freedom of disposition as possible and only sufficient to make adequate provision for the proper maintenance and support of the son, John Herbert Walker.

In all the circumstances, I conclude that a relatively small percentage of the estate would constitute adequate maintenance and support. The estate of John Albert Goodwill Walker is acknowledged to be, after allowance for any tax consequences, $1,532,876. Presumably, there would be executor's, proctor's and probate fees that would further reduce the amount available for distribution. I have concluded that I need not concern myself as to any increases or decreases in the value of the estate and that it is more desirable, to bring this litigation to finality, to set a specific amount rather than a small

percentage figure. The determination of maintenance is not a scientific exercise but one that requires an exercise of judgment. A conservative adequate award of maintenance and support is the lump sum of $105,000.

9. COSTS

With respect to payment of costs out of the estate, I refer counsel to the decision of **Reginald A. Veinot and M. Carmon Veinot**, March 11, 1998, File No. S.BW. 4053, not yet reported. If counsel are unable to agree upon costs, they may present their representations in writing on or before May 26, 1998.

J.

Halifax, Nova Scotia

May 14, 1998